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In the

Supreme Court of the United States

OCTOBER TERM 1962

No. 563

HONORABLE STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION,
Respondent.

BRIEF AMICI CURIAE

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SUMMARY OF ARGUMENT

The issues in this proceeding arose by reason of the acts and conduct of Occidental Petroleum Corporation, its representatives and attorneys, during a reorganization proceeding pending before Judge Stephen S. Chandler, styled, In the Matter of Parker Petroleum Co., Inc., Debtor, No. 10807 in the United States District Court for the Western District of Oklahoma.

The case was one in which the debtor required outside financing in order to complete the reorganization. Occidental Petroleum Corporation filed a plan of reorganization on August 14, 1959, which was accepted by the creditors and stockholders. After many months of hearings, amendments

and changes, it was finally confirmed by the court on May 13, 1960. Then Occidental abruptly served notice, on June 10, 1960, that it was withdrawing from the plan, under an escape clause in the supplemental contract which had been entered into between Occidental and the trustee. Upon a hearing before the District Court, it was held that Occidental could not legally withdraw from the plan, but was bound to carry out its plan and discharge the obligations it had assumed. Upon appeal of the case the United States Court of Appeals for the Tenth Circuit held that Occidental, under its contract with the trustee, had the right to withdraw from the plan. *Occidental Petroleum Corp. v. Walker*, 289 F2d 1.

However, there was another issue in the case that remained undecided, and that was the liability of Occidental for damages in failing to consummate the plan. The Court of Appeals, upon motion for rehearing and clarification, left this question open. *Occidental Petroleum Corp. v. Walker*, 289 F2d 6.

Following the return of the case to the trial court for further proceedings, two motions were filed against Occidental. They were (1) a motion, filed by the trustee, to subordinate the preferred stock of Parker Petroleum Co., Inc. owned by Occidental to the claims of other preferred and common stockholders, and (2) a motion, filed by the creditor, Webster Drilling Company, to tax as costs to Occidental certain expenses of the reorganization of Parker in an amount not less than $250,000.

These motions had been pending for several months without any claim that Judge Chandler was disqualified to hear them when, on February 26, 1962, the trustee filed an application to take the depositions of certain officials and employees of Occidental, in Los Angeles and Bakersfield, California, on March 6, and March 8, 1962, respectively; and the Court had set the date of hearing on said motions for March 13, 1962. Then, late in the day on March 2, 1962, Occidental filed in the case an affidavit styled "Application for Disqualification" of Judge Chandler, which was stated to be "in accordance with Section 144, of Title 28, United States Code."

The affidavit charged personal bias and prejudice on the part of Judge Chandler and sought only his disqualification to hear the two motions set for hearing on March 13, 1962.

Thereafter, on March 6, 1962, without waiting for Judge Chandler to act on the affidavit, Occidental filed in the United States Court of Appeals for the Tenth Circuit the Petition for Writ of Mandamus and or Prohibition, and that Court issued its order directed to Respondent to show cause why such writ should not issue, and restraining the Respondent from deciding any motions or other claims against petitioner (Occidental), *and from the taking of depositions and the examination of witnesses*, a matter which was entirely unrelated to the disqualification of the Judge. The writ was made returnable on March 12, 1962.

The foregoing action was taken notwithstanding the fact that Mr. Irvine, attorney for the trustee, had advised Mr.

Barefoot, attorney for Occidental, on Saturday, March 3rd, the day after filing the affidavit and application for disqualification that Judge Chandler would not hear the motions, but would assign them to another Judge for hearing. Nor was the Court of Appeals advised that all relief requested of the trial court was forthcoming when the Petition for Prohibition was filed there and the stay order obtained pending hearing thereon. Then, as soon as Judge Chandler, then engaged in trying an important case, had time to consider the voluminous affidavit and application, and on March 9th, he issued a written order, duly filed, granting the relief sought in the application for disqualification, although finding that the affidavit was insufficient. A copy of the order was served on Occidental's attorneys on the day it was filed, March 9, 1962.

On the day of the hearing, March 12, 1962, counsel representing various interested parties appeared at the appointed hour, 2:00 o'clock p.m., at the court room of the said Court of Appeals, in Denver, Colorado, and as they entered the court room they were met by Howard W. Rea, one of the attorneys for Occidental, who was passing out some papers designated as "*Petition for Leave to Amend and Supplement* Petition for Writ of Mandamus and or Prohibition" and "Memorandum in Support of Petition for Writ of Mandamus and or Prohibition."

The purported petition for leave to amend would change Occidental's "demand" from disqualification of Judge Chandler to hear *two* motions only to one that would disqualify him

to hear "any and all matters" arising in the proceeding and "from entering any order, decision or judgment therein." Such "demand" would affect the interests of hundreds of creditors and stockholders of Parker Petroleum Co., Inc. without affording them a chance to be heard.

Also, no notice of such amendment was served on Judge Chandler; *no affidavit in support of its allegations was filed as required by Section 144, Title 28, United States Code*, in the lower court and the various counsel participating in the hearing had not previously received any knowledge of its contents. Yet the hearing conducted by the Circuit Court of Appeals on March 12, 1962 at 2:00 o'clock p.m. was purportedly based upon its allegations, of which not anybody, including Judge Chandler, prior to that hour, had any knowledge except those who did the alleging.

The Petition for Writ of Certiorari, filed herein, sets forth several serious legal questions as to the validity of the proceeding above described. The Respondent's brief in opposition evades these issues and consists principally of a scurrilous attack upon the personal integrity of a District Judge of the United States, whose long career has been one of faithful devotion to duty in his judicial capacity.

This brief will discuss first the fundamental and jurisdictional questions involved; and then specific attention will be given to the irresponsible statements appearing in respondent's brief.

The serious legal questions which, it is submitted, render wholly void the decision of the Circuit Court of Appeals, may be stated as follows:

1. Was the remedy of "Mandamus and or Prohibition"[1] available to disqualify Judge Chandler while this case was pending, or is the only remedy an appeal from the final judgment in the case?

2. If it should be held that "Mandamus and or Prohibition" is an available remedy in the situation, would not the jurisdiction of the Circuit Court of Appeals be limited to the relief alleged and sought in the affidavit filed by respondent under Section 144 of Title 28 United States Code in the Court below? After instituting a proceeding in Mandamus and or Prohibition seeking relief under allegations set forth in such an affidavit, can the affiant, by simply amending his petition in the Circuit Court of Appeals, obtain a decision on disqualification which is completely different from and at variance with that sought in the affidavit filed under said Section 144?

3. Does Section 332 of Title 28, United States Code, creating in each circuit, what is called a "judicial council" for the "effective and expeditious administration of the *business* of the courts within its circuit," confer upon the said "judicial council" any powers other than those which are "administrative?" Do the "supervisory" powers conferred by that Act upon the council include the power to disqualify a District Judge from hearing a pending case? Do we have two statutes, independent of each other,—Sections 144 and 332—under which a District Judge may be so disqualified?

4. In view of the words of Section 144, requiring the affidavit to state that the judge has a "*personal* bias or prejudice," does not a proper construction of this provision mean that the judge must have a "bias or

[1]Emphasis hereinabove and hereinafter is supplied unless otherwise indicated.

prejudice" that is of extrajudicial origin? Do not statements made by a judge, in the course of a proceeding, which are based on acts and conduct of a party to the case, constitute judicial opinion as distinguished from the "bias or prejudice" as contemplated by Section 144? Isn't this true, even though those statements are made with vehemence?

The foregoing issues will be taken up in their order.

I

The Remedy of Respondent Was by Appeal Only, and not by "Mandamus and or Prohibition"

Occidental assumed to invoke the All Writs Act, 28 United States Code 1651 (a), in presenting its Petition for Mandamus and or Prohibition to the Circuit Court of Appeals. But that remedy is not available in a case of this kind. The case of *Roche, U. S. District Judge v. Evaporated Milk Association, 319 US 21, 63 SCt 938, 87 LEd 1185 (1943)*, is in point. In that case the Supreme Court was asked to review the action of the Circuit Court of Appeals in directing, by mandamus, a District Court to reinstate certain pleas in abatement in a criminal case. In holding that the Court of Appeals acted erroneously, the Supreme Court said:

> "As the jurisdiction of the circuit court of appeals is *exclusively appellate*, its authority to issue writs of mandamus is restricted by statute to those cases *in which the writ is in aid of that jurisdiction* * * *.
>
> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a *lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so* * * *.

> "Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record (citing authorities).
>
> * * * * *
>
> "Circuit courts of appeal, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U.S.C. § 225 (a)." (Emphasis supplied)

In *La Buy v. Howes Leather Company, 352 US 249, 77 SCt, 1LEd 2d 290 (1956)*, this Court, by a five to four decision, held that a Court of Appeals could issue a writ of mandamus requiring a district court to vacate an order appointing a Special Master to hear and decide certain issues in a case that would amount to what the Court said was an "*abdication of the judicial function* depriving the parties of a trial before the court on the *basic issues* involved in the litigation." But although this Court did uphold the issuance of a writ of mandamus in the *La Buy* case, it took particular care to limit the use of such writs, saying:

> "This is not to say that the conclusion we reach on the facts of this case *is intended, or can be used*, to authorize the *indiscriminate* use of prerogative writs as a means of reviewing interlocutory orders."

And then it reaffirmed its holding in *Bankers Life & Casualty Company v. Holland, 346 US 379 (1953)*, in the words:

> "* * * All Writs Act is meant to be used only in the *exceptional case* where there is a clear abuse of discretion or usurpation of judicial power * * *."

The very issue involved here was subsequently decided in *Albert v. U. S. District Court for Western Dist. of Michigan, 283 F2d 61 (6th Cir. 1960)*. In that case an affidavit of

bias and prejudice had been filed against a District Judge, and the Judge had refused to disqualify. An action in mandamus and prohibition was brought in the Circuit Court of Appeals to compel the District Judge to certify his disqualification. The Court of Appeals refused to grant the writ. The following statements are quoted from the opinion:

> "The order entered by the District Judge refusing to disqualify himself is not reviewable upon appeal until a *final judgment* has been entered in the case. Collier v. Picard, 6 Cir., 1956, 237 F2d 234.
>
> "Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are *ministerial*, plainly defined and peremptory. United States ex rel. McLennan v. Wilbur, 283 US 414, 51 SCt 502, 75 LEd 1148; United States ex rel. Girard Trust Co. v. Helvering, 301 US 540, 57 SCt 855, 81 LEd 272; Rayborn v. Jones, 6 Cir. 1960, 282 F2d 110.
>
> "In our view, the consideration by the District Judge of the sufficiency of the affidavit of bias and prejudice is not a *ministerial*, but a *judicial* act * * *.
>
> "* * * This remedy is reserved for really extraordinary causes. It may not be used as a substitute for appeal. Roche v. Evaporated Milk Association, 1943, 319 US 21, 63 SCt 938, 87 LEd 1185; Beneke v. Weick, 6 Cir. 1960, 275 F2d 38.
>
> "The writ may be granted only where it is clear and undisputable that there is no other legal remedy. Ex parte American Steel Barrel Co., 1913, 230 US 35, 33 SCt 1007, 57 LEd 1379.
>
> "Mandamus has been held not to be the proper remedy to compel a judge to recuse himself. Green v. Murphy, 3 Cir. 1958, 259 F2d 591; Korer v. Hoffman, 7 Cir. 1954, 212 F2d 211, 45 ALR 2d 930; Hurd v. Letts, 1945, 80 U. S. App D C 233, 152 F2d 121."

An application for writ of certiorari in this case was denied by this Court on February 27, 1961. *365 US 828, 81 SCt 713, 5 LEd 2d 706.*

Other cases announcing the same rule include *Green v. Murphy, 259 F2d 591 (3rd Cir. 1958); Korer v. Hoffman, 212 F2d 211 (7th Cir. 1954); Collier v. Picard, 237 F2d 234 (6th Cir. 1956).*

It is submitted that the issue here did not involve an "aid to jurisdiction" (*Roche v. Evaporated Milk Co.*, supra); nor a "usurpation of judicial power" (*Bankers Life & Casualty Co. v. Holland*, supra); nor did it fall within "the exceptional circumstances existing here." (*La Buy v. Howes Leather Co.*, supra.)

In the percuriam opinion of the "Court" (page 23a, Appendix C, Petition for Writ of Certiorari herein, also 303 F2d 55) the Court cites, as authority for the use of the All Writs Act, 28 USC 1651, in a disqualification case under § 144, its own decision in *United States v. Ritter, 273 F2d 30, 32.* Yet, that decision is not authority for the case against Judge Chandler.

There is a clear distinction between the *Ritter* case and the case at bar. In the *Ritter* case there had been two appeals. On the first appeal (220 F2d 666) the Court of Appeals found that the case was "tried in an atmosphere of maximum emotion and a minimum of judicial impartiality." On certiorari, however, the Supreme Court said "after oral argument and thorough consideration of the record we do

not find that the trial was conducted so improperly as to vitiate" the trial court's findings (351 US 173). The case went back for retrial and on second appeal to the Circuit Court of Appeals (257 F2d 920) that Court held that the trial court could not give the "calm, impartial consideration which is necessary for a fair disposition" of the case and that "he should step aside"; and that when the case was remanded further proceedings in the case be had before another judge. After denial of certiorari (358 US 899) the mandate of the Circuit Court of Appeals carried forward the Circuit Court's suggestions that further proceedings be had before another trial judge.

The trial court, however, refused to transfer the case to another judge. Thereupon, the United States filed a "motion for the entry of an amended judgment and trial before another judge," and also an order to prohibit Judge Ritter from setting the case before himself for retrial.

In granting the government's application the Circuit Court of Appeals said: "We have no doubt of our power and inescapable duty to grant the relief sought, whether it be found in the all-writ statute *or* in the exercise of the *inherent powers* of *appellate jurisdiction* to effectuate what seems to us to be the manifest ends of justice." This raises an important question: "Is a Circuit Court of Appeals possessed of 'inherent' powers to disqualify a district judge, or is that remedy by specific statute only?"

However, the issue in the *Ritter* case was entirely different from that in the case at bar. The disqualification there

had been determined on *appeal*, and the Court ordinarily has the power to do whatever is necessary to enforce its *appellate jurisdiction*. However, even in *Ritter* case there had never been filed an affidavit under Section 144 to disqualify the District Judge.

2

Occidental's Amended Petition for "Mandamus and or Prohibition" to Disqualify Judge Chandler from Hearing "Any and All Matters" Arising in the Proceeding and "From Entering Any Order, Decision or Judgment Therein," Did Not Confer Jurisdiction on the Court of Appeals to Grant the Petition for the Reason That No Affidavit Seeking Such Disqualification, Required Under Said § 144, Had Been Filed in the District Court

The basis for disqualifying a Judge of the District Court of the United States is the affidavit required by § 144, Title 28, United States Code. That statute is as follows:

> "Whenever a party to any proceeding in a district court makes and files a *timely* and *sufficient* affidavit that the judge before whom the matter is pending has a *personal bias or prejudice either against him* or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear *such proceeding*.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A

party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

The courts have uniformly held that strict compliance with the provisions of this statute is required, and there have probably been more decisions on this point rendered by the Court of Appeals for the Tenth Circuit than by any other Circuit Court of Appeals.

In *Scott v. Beams*, 122 F2d 777, 787 (10th Cir. 1941), that court, speaking through Judge Bratton, in a case where disqualification of a District Judge was sought, said:

"The statute thus extending the privilege of disqualifying a judge is remedial; but due to its nature and the opportunity for abuse of the privilege, *strict compliance with its provisions is exacted.*"

The foregoing case is often referred to as the famous Jackson Barnett heirship case, in which Judge Williams, of the Eastern District of Oklahoma, was charged with "general allegations of hostility of the court, abuse of witnesses, threats to have them incarcerated," etc. The Court held the affidavit for disqualification insufficient. Certiorari was denied, 315 US 809, 62 SCt 794, 795, 799, 86 LEd 1209.

Another case in which the sufficiency of the affidavit for disqualification was an issue was *Skirvin v. Mesta*, 141 F2d 668, 672 (10th Cir 1944). The question was whether the affidavit had been filed within the time required by the statute. Again this Court spoke through Judge Bratton and said:

"While the statute is remedial, due to its nature and the opportunity for abuse of the privilege which it ex-

> tends to a party litigant, *strict compliance* with its provisions is required. Scott v. Beams, 10 Cir. 122 F2d 777; Mitchell v. United States, 10 Cir, 126 F2d 550."

A much later case was that of *Martin v. United States, 285 F2d 150 (1960)*, in which Judge Wallace, of the Western District of Oklahoma, was the target of the motion to disqualify. In that case the opinion, by Chief Judge Murrah, stated:

> "The petitioner also complains of the failure of the trial court to consider his motion to disqualify himself from further consideration of the case after having denied petitioner's motions, resulting in the previous appeal in 273 F2d 775. It is sufficient to say that in the first place, *the motion does not comply with the statutory requirements for the disqualification of a trial judge*. See 28 USC § 144; Skirvin v. Mesta, 10 Cir, 141 F2d 668; Scott v. Beams, 10 Cir, 122 F2d 777."

And in *Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F2d 589 (7th Cir 1945)*, the court in referring to § 21 of the Judicial Code (which was succeeded by § 144) said that the statute must be "literally and strictly observed."

There are other cases from different jurisdictions which state emphatically that the requirements of § 144 must be complied with strictly, and such affidavits will be strictly construed. *Beland v. United States, 117 F2d 958 (5th Cir 1941), cert den 313 US 585; In re Lisman, 89 F2d 898 (2d Cir 1937)*; Cf *Ex Parte American Steel Barrel Co., 230 US 35, 43, 33 SCt 1007, 57 LEd 1379 (1913)*.

The amended petition for mandamus and or prohibition, filed herein on March 12, 1962, superseding the original

petition filed March 6, 1962, demands that Judge Chandler be disqualified "*from hearing and deciding any and all matters arising in these proceedings* (In the Matter of Parker Petroleum Co., Inc.) *whatsoever, and from entering any order, decision or judgment therein.*" This means, of course, that Judge Chandler would be completely removed from that case if the writ is granted. So the issue here is:

Does the affidavit of disqualification filed in the District Court seek the removal of Judge Chandler entirely from the case?

The answer is simple. *It does not.* The disqualification sought by the affidavit is "from deciding the motions set for hearing on March 13, 1962." Those two motions are described in the affidavit. Not only does the affidavit fail to ask for Judge Chandler's disqualification in the conduct of the case generally, but it specifically recognizes his qualification to act as judge in the case on all other matters, when it states that the judge should not decide any claims against the applicant "*other than as a member of the class of preferred stockholders of Parker Petroleum Co., Inc.*"

There are no claims against Occidental, individually, except the two mentioned in the affidavit, and the action for damages for failure to consummate the aborted plan of reorganization confirmed by Judge Wallace, 289 F2d 6. Occidental's position in this case otherwise is exactly the same as that of any other preferred stockholder, except that Occidental acquired its stock after Parker reorganization proceed-

ings had commenced. Hence the affidavit it not sufficient to require disqualification as to the entire case.

The exclusive procedure by which a District Judge can be disqualified for bias or prejudice is that prescribed in § 144. No other statute deals with such disqualification. The statute must be complied with strictly, and the affidavit *must* be strictly construed.

To say that an applicant can file such an affidavit in the District Court, and then come to the Circuit Court of Appeals by applying for the extraordinary writ of prohibition, and, at that time, change its application and seek a different disqualification of a judge, not sought in that affidavit below, is simply to ignore the statute. And there are no grounds for ignoring the statute. It has been recognized, applied and enforced in a multitude of cases. It is not to be ignored. Occidental Petroleum Corporation filed the affidavit and it is bound by its own act. It cannot enlarge or supplement the contents of that affidavit in the Circuit Court of Appeals.

It is submitted, therefore, that the amended application for a writ of prohibition is void on its face, and was insufficient to confer jurisdiction on the Court of Appeals to grant the writ.

Objection was made by Mr. Irvine, attorney for the trustee, to the filing of the amended petition of Occidental, which was offered at the hour set for hearing on the original petition. The Court asked if there were objections and the fol-

lowing colloquy occurred (Record of Hearings, March 12 and 13, 1962, before Circuit Court of Appeals, page 5):

"THE COURT (Chief Judge–Murrah): Is there any objection to the amendment?

"MR. IRVINE: If the Court please, yes, we have several serious objections. I think perhaps that they can be presented at the time that we argue this matter, or we can do so at this time.

"THE COURT (Chief Judge Murrah): Well, we have to get our pleadings straightened. We have to get our pleadings in before proceeding. That is the first thing we must do, as I understand it.

"Now, as I understand counsel, he says that he wishes to amend his petition to allege events, matters, occurring since your original petition was filed?

"MR. REA: Yes, Your Honor.

"THE COURT (Chief Judge Murrah): Well, what objection could you make to that?

"MR. IRVINE: Because, sir, they have changed their whole prayer for relief and they have not followed the statutory method of obtaining that relief. The prior petition, the one on which we are here on a show cause order, requested a writ of prohibition or mandamus to disqualify Judge Chandler from the hearing of certain specified hearings, that is, those matters which had to do with the motion to subordinate the stock of Occidental Petroleum Corporation, pending in the District Court, Western District of Oklahoma, since last May. Also, there was a question of damages that was left open by this Court in its decision in Walker versus Occidental, which was also one that is pending. They asked that the Judge be disqualified from hearing only these matters, and those matters pertaining specifically to Occidental.

"In their enlarged petition, which was filed just a short while ago, they have requested that Judge Chandler be disqualified from hearing all matters in the matter of Parker Petroleum.

"THE COURT (Chief Judge Murrah): Well, how could the Court disqualify or issue a writ of prohibition against a Judge hearing a part of a lawsuit?

"MR. IRVINE: Well, sir, all of these matters are of the reorganization of a corporation.

"THE COURT (Chief Judge Murrah): Well, just a moment.

"(The Judges of the Court conferred.)

"THE COURT (Chief Judge Murrah): Leave will be granted to amend."

In the face of all the authorities requiring strict compliance with § 144, the Court would excuse Occidental from complying with the statute by saying that a writ of prohibition cannot issue against "hearing a part of a lawsuit." The short answer to this is that a writ of prohibition cannot issue in any case where the affidavit under § 144 does not state exactly the nature of the disqualification.

There is another well-defined principle of jurisdiction applicable to Occidental's changing attitudes. In the Original Petition for Mandamus and or Prohibition it asked that Judge Chandler be restrained from entering any order on the two motions described therein, but recognized that the Judge was qualified to enter any order in the case affecting Occidental "as a member of the class of preferred stockholders of Parker Petroleum Co., Inc."

In the Amended Petition it sought to have Judge Chandler removed from the case entirely.

It is submitted, therefore, that the Court of Appeals had no jurisdiction to enter any order as to either the Original or Amended Petitions.

The Amended Petition sought a disqualification not covered by the Affidavit of Disqualification filed in the District Court, and therefore a nullity, as we contend.

The Original Petition was abandoned when the Amended Petition was filed and, therefore, has been expunged from the case.

In *Bullen v. De Bretteville, 239 F2d 824, 833 (9th Cir 1956), cert den 353 US 947, 77 SCt 825, 1 LEd 2d 856*, the court held:

> "It is hornbook law that an amended pleading supersedes the original, the latter being treated thereafter as non-existent. Nisbet v. Van Tuyl, 7 Cir, 224 F2d 66; Meyer v. State Board of Equalization, 42 Cal 2d 376, 267 P2d 257; 71 CJS, Pleading, § 321. Once amended, the original no longer performs any function as a pleading and cannot be utilized to aid a defective amendment."

In *Nisbet v. Van Tuyl, 224 F2d 66, 71 (7th Cir 1955)*, the court said:

> "An amended pleading ordinarily supersedes the prior pleading. The prior pleading is in effect withdrawn as to all matters not restated in the amended pleading, and becomes functus officio. 71 CJS 321, p. 717."

And the Tenth Circuit Court of Appeals, speaking through Judge Phillips, has said that "the amended pleading supersedes and takes the place of the original pleading." (Citing many authorities.) *Aetna Life Insurance Co. v. Phillips, 69 F2d 903 (1934).*

Therefore, it is submitted that the Original Petition is no longer a part of this case; and the Amended Petition confers no jurisdiction for the reasons and under the authorities hereinabove set forth. Hence, there was nothing before the Circuit Court of Appeals on which it could base an order of disqualification.

3

Does § 332, of Title 28, United States Code Creating a Body Called a "Judicial Council" in Each Circuit, Confer Upon the "Council" the Power to Disqualify a District Judge in a Case Pending Before Such Judge?

The final determination of this case in the Circuit Court of Appeals presented some unusual situations and resulted in some unprecedented adjudications.

Two separate bodies, each created by Congress in different years,—the Circuit Court of Appeals and the Judicial Council for the Tenth Circuit,—has each entered a separate, solemn order, reciting the same conclusions; and each orders that Honorable Stephen S. Chandler, respondent, proceed no further in the matter of Parker Petroleum Co., Inc., debtor. Each order then directed Honorable Alfred P. Murrah, Chief

Judge, to designate another judge to hear and determine all further proceedings in the said cause. The authority of the Chief Judge of a Circuit Court of Appeals to appoint a certain District Judge to hear a case in his own district is not clear. Section 137, of Title 28 United States Code, provides that such assignments shall be made by the "rules and orders" of the District Court. In the District Court for the Western District of Oklahoma there are four Judges, and the rules of that Court provide that the Court, consisting of all the Judges, shall make the assignment of cases. Section 292, of Title 28 United States Code provides for assignment by the Chief Judge of a Circuit Court of Appeals of (1) District Judges to sit upon the Court of Appeals, and (2) District Judges to hold court outside of their districts.

As pointed out hereinabove, this proceeding had its inception in the petition of Occidental Petroleum Corporation for mandamus and, or prohibition, filed in the Circuit Court of Appeals. Neither Occidental, nor any other party to this proceeding, has attempted to invoke the jurisdiction of the Judicial Council to decide anything.

Hearing were had before the Court, with Judges Murrah, Pickett and Breitenstein sitting, on March 12 and 13, and on April 10, 1962, and all parties regarded the hearings as completed at the conclusion of the hearing on said April 10. Thereafter, notices went out to interested parties for another hearing and, as stated in the Council's order, "the Court met en banc on April 20, 1962." Judges Lewis and Hill, who had not participated in the hearings before, were pres-

ent, and they with the three judges who had been sitting, constituted the Court "en banc."

On April 20, when the Court reconvened, with the five judges present, Chief Judge Murrah announced that while Judges Lewis and Hill had not participated in the earlier hearings and had not heard the evidence, they had familiarized themselves with the case. And then the order recites that "all parties present consented to the consideration of the case by the court en banc on the record as then made and as previously made."

Next, the real reason for assembling all of the five judges is revealed. The Court had decided to refer this whole case to the Judicial Council. And in the opinion of the "Council," rendered April 20, 1962, at 11:00 o'clock a.m.—after the adjournment of the "Court"—the following remarkable statement is made.

> "At the conclusion of the en banc hearing the Court affirmed the determination of the previously sitting judges that the *issues raised as to the qualification of the Honorable Stephen S. Chandler to proceed further were of such a serious nature the matter should be presented to the Judicial Council of the Tenth Circuit of the United States.*" (Pet for cert, p. 27a)

The foregoing statement raises a regular fusillade of questions, among them being:

> Why was the Tenth Circuit Court of Appeals alone incapable of deciding these "serious" issues?
>
> How serious must the issues be before the "Court" surrenders to the "Judicial Council?"

From what source does the Judicial Council receive its authority to decide these super-serious issues?

Do the same five Judges, sitting as a "Judicial Council" possess greater authority to decide these judicial questions than they do sitting as a Court?

Isn't it a fact that the Act of Congress—§ 332 of Title 28, United States Code,—creating the Judicial Council, does not give the Council the authority to decide judicial questions at all?

Is it not true that § 332 deals only with administrative matters regarding the expeditious transaction of the administrative business of the courts, and that the powers granted therein to the Judicial Council are thus limited?

The issue as to whether the Judicial Council, under § 332, has authority to "supervise" a District Court as to its judicial rulings during a pending case and prior to judgment, is a serious one.

Even more serious is the claim that the Judicial Council has the power, *on its own initiative*, to disqualify a District Judge at all, particularly at any stage of a pending case.

In this case the Judicial Council has assumed those powers. In the Council's "Order," following its convening at 11:00 o'clock a.m. on Friday, April 20, 1962, the following appears:

> "*Accordingly, pursuant to the power and authority of the Judicial Council under the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. § 332,* it is ORDERED that the Honorable Stephen S. Chandler shall proceed no further in the Matter of Parker Petroleum Co., Inc., Debtor, No. 10807 Bankruptcy on the docket of the United States District Court for the Western District of Oklahoma."

Thus, in a "closed-door" session the Judicial Council entered an order condemning Judge Chandler for holding "closed-door sessions" in endeavoring to secure information which would assist him in deciding the administrative questions presented in the *Parker* case.

The validity of the Council's order is next discussed.

Does § 332 Confer Power Upon the Judicial Council, as Such, to Order Disqualification of a District Judge in Cases Pending Before Him?

Section 332 calls for a council to meet twice a year and to be attended by all the Circuit Judges in active service. It directs the Chief Judge to submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts, and provides that: "The Council shall take such action thereon as may be necessary." Then it provides:

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of *business* of the courts within its circuit. The district judges shall promptly carry into effect all orders of judicial council." (June 25, 1948, c. 646, 62 Stat 902

Section 332 is based on Chapter 501 of the Act of Congress of August 7, 1939 (53 Stat 1223). In that Act the Congress added to the Judicial Code of March 3, 1911 (Vol 36 U.S. Stat. at Large, pp. 1087 et seq), as stated in the enactment clause, "a new chapter to be numbered XV and entitled 'The Administration of the United States Courts'." The entire act of August 7, 1939 has to do purely with *admin-*

istrative matters, and not *judicial actions*. The first section (§ 302) creates "an establishment to be known as the *Administrative* Office of the United States Courts, with a Director at the head thereof * * *." The succeeding sections,—303, 304 and 305,—provide for employees to assist the director; the employment of "administrative personnel" of the courts, examination of court dockets; "preparation of statistical data and reports of the *business* transacted by the courts;" disbursement of money appropriated for the maintenance and operation of the courts; the purchase etc. of equipment and supplies; and such other matters.

Section 306 follows and it is in these words:

> "*To the end that the work of the district courts shall be effectively and expeditiously transacted*, it shall be the duty of the senior circuit judge of each circuit to call— a council composed of the circuit judges for such circuit who are hereby designated a council for *that purpose*—."

Then § 306 continues with: "The senior judge shall submit to the council the quarterly reports of the Director * * * and such action shall be taken thereon by the council as may be necessary."

Then follows this sentence:

> "It shall be the duty of the district judges promptly *to carry out the directions of the council as to the administration of the business of their respective courts*."

Section 332 of Title 28, United States Code, is based on § 306 of the Act of Congress of 1939. In the Reviser's Note to this section it is stated that certain changes were made in

the phraseology of § 306 as it was carried forward into the 1948 recodification, *but there was no change in the intent or meaning of the Act. It deals purely with administrative matters of the courts.* Indeed, the very fact that the supervision covered by § 306 is to be administered by the circuit judges as a *council*, and not as a *court*, would seem to be conclusive that supervision of *judicial* acts of the district courts was not contemplated by that statute. The procedure for reviewing judicial acts of the district courts had already been fixed by the Judicial Code long before § 306 was enacted.

Section 144, of Title 28, United States Code, providing for the disqualification of district judges, was a part of the Act of Congress of March 3, 1911. As said by the Supreme Court in *Ex Parte American Steel Barrel Co., 230 US 35, 44, 33 SCt 1007, 57 LEd 1379 (1913)*:

> "The proceeding to retire a trial judge of the United States Court from further hearing a case of which he has jurisdiction, had its origin in the new Judicial Code, effective January 1, 1912 and constitutes § 21 of that Code."

Section 21 of the original Judicial Code was carried forward in the 1940 edition as § 25 of Title 28, United States Code, and appears in current (1948) codification as § 144 of Title 28, United States Code.

Thus, the present § 144 has been on the statute books as the exclusive procedure for disqualifying a district judge since January 1, 1912. Is it to be presumed, then, that a

"council," created for administrative purposes only, has succeeded to the judicial powers not even mentioned, directly nor indirectly, in the statute creating such a body? It is a well-settled rule that a statute conferring certain general powers will not be construed as applying to cases covered by a prior special act upon the same subject.

It should be remembered that § 144 became a law on January 1, 1912; whereas § 332 did not become a law until August 7, 1939. Section 144 is a statute dealing specifically with disqualification of a district judge; § 332 deals with specific powers of a "council," composed of circuit judges, for the purpose of promoting the effective and expeditious transaction of the administrative business (work) of the Courts. Both statutes were carried forward in the 1949 and 1948 editions of the United States Code. The rule stated in *Washington v. Miller*, 235 US 422, 428, 35 SCt 119, 59 LEd 295 (1914), is directly applicable to this situation. There the court said:

> "Where there are two statutes upon the same subject, *the earlier being special, and the later general*, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that *the special is intended to remain in force as an exception to the general*. (Townsend v. Little, 109 US 504, 512; Ex Parte Crow Dog Id., 556, 570; Rodgers v. United States, 165 US 83, 87-89.)"

Other cases announcing this same rule of construction are:

Baltimore National Bank v. State Tax Commission of Maryland, 297 US 209, 215, 56 SCt 417, 80 LEd 586 (1936);

Rodgers v. United States, 185 US 83, 22 SCt 582, 46 LEd 816 (1902);

Johnson v. Washington, 190 US 179, 185, 23 SCt 825, 47 LEd 1008 (1903);

United States v. Nix, 189 US 199, 205, 23 SCt 495; 47 LEd 775 (1903), where it is said specifically: "The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject."

Bulova Watch Co. v. United States, 365 US 753, 758, 81 SCt 864, 6 LEd 2d 72 (1961), where this Court said: "It is a familiar law that a specific statute controls over a general one without regard to priority of enactment." (Citing cases.)

Ruth v. Eagle-Picher, 225 F2d 572, 574 (10th Cir 1955), a decision by the same court that issued the disqualifying order in this case. Many authorities in support of this rule are cited in the opinion of Judge Phillips in the *Eagle-Picher* case.

It is therefore respectfully submitted that the Judicial Council of the Tenth Circuit, as such, is not vested with judicial powers, and particularly the power to order disqualification of District Judges in pending cases. It is respectfully submitted that § 144, of Title 28, United States Code, is the exclusive remedy for such disqualification.

Reviewing the evidence in this case, it would appear that the sitting judges had made an early determination to refer the disqualification of Judge Chandler to the Judicial Council as such. Whether that decision was influenced by the uncertainty which existed as to whether the amended petition of Occidental conferred jurisdiction upon the Court is only speculative. However, the Council's order recites that the "sitting judges" had previously decided on that course, and in the hearings before the Court evidence was admitted that bore no relation to the "bias or prejudice" issue.

For example, in answer to an objection of Mr. Irvine, the Court, speaking through Judge Murrah, said (Transcript of Proceedings in Circuit Court of Appeals, March 12-13, 1962, p. 159):

> "We are not just trying an affidavit of prejudice here—if you think that that is the scope of the inquiry, the legal sufficiency of an affidavit of prejudice.
>
> "This Court sits to exercise its supervisory powers, and there are plenty of cases, if you will refer to them in the books, from this Court, to illustrate that very point. We are not just sitting here to decide the legal sufficiency of an affidavit to disqualify a trial judge. We are sitting here in the exercise of our supervisory powers as a court, to determine whether or not in the whole matter of the proceedings here there should be some action on the part of this Court, in the exercise of those powers, which are undisputed. And in doing so, we apprehend that it goes beyond the mere legal sufficiency of an affidavit to disqualify."

The foregoing statement indicates that the Court, purporting to be trying the issues raised in the Amended Petition of Occidental, was going to admit *any* evidence which, in the

opinion of the Judges, would constitute improper conduct of any kind, and this they certainly did. Therefore, this was not a proceeding under § 144. In fact, it was not a proceeding authorized under any statute. However, the Judges may have concluded that § 332 conferred upon them absolute power to control every act of a District Judge in a case pending before him. And it is respectfully submitted, as argued above, that the Judicial Council has no authority to control any judicial act of a District Judge.

Another situation appeared to arouse the resentment of Chief Judge Murrah against an attorney who raised a jurisdictional question. The attorney was Kirk Windle, attorney for the Securities and Exchange Commission, who has participated in this case from its beginning. Mr. Windle was presenting an argument against the disqualification of Judge Chandler and his remarks appear in the Transcript of Proceedings in the Circuit Court of Appeals of April 10, 1962, pages 70 to 80, inclusive. Explaining his connection with this case, and presenting the Commission's position and views on the disqualification of Judge Chandler, the following is quoted from the said record:

> "MR. WINDLE: If the Court please, there really isn't much left to be said after Mr. Irvine's statement and after Mr. Crowe's statement. The Commission, as Your Honors know, participates in Chapter 10 reorganization proceedings, pursuant to Section 208 of Chapter 10. We act as an adviser to the Court and we act as a protector of the public investor interest in those cases.
>
> "As such, we have been in the Parker Petroleum reorganization from its beginning, both under Judge Wallace before his death and under Judge Chandler. We

have filed a memorandum in which we conclude that this matter is not properly before this Court, that the petition that was filed by the Petitioner is not in compliance with the established rules that have been laid down by the Supreme Court, in the Federal Rules of Civil Procedure and in the established cases.

"We conclude that, even if the matter were properly before this Court, the evidence which has been presented by the Petitioner is not, in our opinion, sufficient to warrant the exercise of the extraordinary writs of mandamus or prohibition, insofar as either disqualifying Judge Chandler from hearing the matters pertaining to Occidental Petroleum Company, or certainly not as to removing him from the entire case.

"THE COURT (Judge Pickett): Mr. Windle, I have a little difficulty in understanding the interest of the Securities and Exchange Commission in a proceeding of this kind.

"MR. WINDLE: Well, Your Honors—

"THE COURT (Chief Judge Murrah): Well, I do too. We are not interested in the feasibility of this plan, and we are just interested in a very narrow issue, and what business is it of the S.E.C. about who tries it or who decides it?"

Later Mr. Windle then stated why he thought this case was improperly before the Circuit Court of Appeals. That statement, and the Court's reply, appear on page 74 of said record:

"MR. WINDLE: No, Your Honor. In the Ritter case the matter was properly before this Court on an appeal. In this case it is improperly before this Court on a petition for mandamus or prohibition, because of the failure of Judge Chandler to rule on the affidavit of bias and prejudice when he hadn't time to do so.

> "THE COURT (Chief Judge Murrah): As far as I am concerned, Mr. Windle, I don't think you have any standing in this Court. I don't think it is any business of the S.E.C. who has jurisdiction of this subject matter; and I should think that the two of you would have something else to do besides coming here on matters of this kind. This is a matter that the parties are interested in. I fail to see how the S.E.C. has any standing in this matter."

Thus, is seems evident that the Court did not consider that its jurisdiction to disqualify Judge Chandler was limited by § 144. The Securities and Exchange Commission has the right and the duty to appear in reorganization proceedings before the "Court," under § 208 of Chapter 10. It is therefore impossible to determine the source of the claimed jurisdiction, unless it was asserted under § 332; and Judge Murrah's criticism of the Securities and Exchange Commission is hardly understandable.

4

The Bias or Prejudice Issue

The petitions of Occidental Petroleum Corporation herein charge "bias or prejudice" on the part of Judge Chandler. Recovery must be based on:

> (1) Compliance with the requirements of the statute providing for disqualification of a Judge for alleged bias or prejudice, and
>
> (2) Whether the statements of the Judge constitute "personal bias or prejudice" as those statutory words have been construed by this Court and the Circuit Courts of Appeal.

The issue of complying with the formal requirements of the statute has been argued under 2 above.

The question here under consideration is whether the questioned statements of the Court constituted "personal bias or prejudice," as those words, used in § 144, have been analyzed and construed by the courts, or were an expression of judicial opinion, based on the acts and statements of Occidental and its representatives in the *Parker* case.

The courts have had much to say about what constitutes "personal bias or prejudice." In construing this very statute this Court in *Ex Parte American Steel Barrel Co., 230 US 35, 43, 33 SCt 1007, 57 LEd 1379 (1913)*, said:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard."

In *Henry v. Speer, 201 Fed 869, 872 (5th Cir 1913)*, the Court, in referring to the affidavit charging bias and prejudice, said:

> "Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with

provisions. Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the Judge toward petitioner, *but rather a prejudgment on the merits of the controversy and against deponent's right to recover. Section 21 is not intended to afford relief against this situation.*"

In *Ferrari v. United States, 169 F2d 353 (9th Cir 1948)*, the court said:

> "Section 21 of the Judicial Code 28 U.S.C.A. § 25, provides that as a prerequisite to the disqualification of a judge personal bias must be shown, which has been held to be an *attitude of extrajudicial origin*. Craven v. United States, 1 Cir., 22 F2d 605. Judicial opinion formed *on evidence in a hearing* against others is not personal bias or prejudice requisite to the right of disqualification. Parker v. New England Oil Corp., 13 F2d 497. Judgment affirmed."

In *Knapp v. Kinsey, 232 F2d 458, 466 (6th Cir 1956)*, the court said:

> "The bias or prejudice which will disqualify a judge must be 'personal' bias or prejudice as distinguished from a judicial one. Craven v. United States, 1 Cir., 22 F2d 605, 607-608, certiorari denied 276 US 627, 48 SCt 321, 72 LEd 739; * * *. A Judge is not disqualified merely because he believes in upholding the law, even though he says so *with vehemence*. Baskin v. Brown, 4 Cir., 174 F2d 391; Foster v. Medina, 2 Cir., 170 F2d 632."

In *Baskin v. Brown, 174 F2d 391, 394 (4th Cir 1949)*, the court said:

> "A judge cannot be disqualified merely because he belives in upholding the law, even though he says so *with vehemence*. Personal bias against a party must be shown. Berger v. United States, 255 US 22, 25, 41 SCt

230, 65 LEd 481, Ex parte American Steel Barrel Co., 230 US 35, 33 SCt 1007, 57 LEd 1379; Henry v. Speer, 5 Cir., 201 F. 869; Saunders v. Piggly Wiggly Corporation, D.C., 1 F2d 582; Craven v. United States, 1 Cir., 22 F2d 605, 607-608. As was well said in the case last cited:

> "'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a *bias* (or state of mind, 255 US 42, 41 SCt 236, 65 LEd 481) against wrongdoers, *civil or criminal, acquired from evidence presented in the course of judicial proceedings before him.* Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings now none too speedy or effective'."

Judge Parker's opinion in the *Baskin* case was followed by the Supreme Court of the United States in *Terry v. Adams, 345 US 461, 73 SCt 809, 97 LEd 1152 (53).*

Perhaps no case is so clearly applicable to the issue here as the case of *Scott v. Beams, 122 F2d 777 (10 Cir. 1941)*, known as the *Jackson Barnett* case. In a very thorough opinion by Judge Bratton the "bias or prejudice" statute was analyzed and construed. As to the contents of the affidavit, the opinion, after referring to certain specific items, continues as follows:

> "Otherwise the affidavit abounded with general allegations of hostility of the court, abuse of witnesses and threats to have them incarcerated, and encouragement of attorneys for other litigants in their abuse of such witnesses; but these were conclusions, not statements of fact * * *.

"The record indicates that the attitude of certain attorneys was provocative at times, and the court was justified in the belief that some of the testimony was fabricated. Still, we are not to be understood as approving all of the statements, comments and criticisms coming from the court, or the excess of interference with the attorneys in their examination of witnesses. But there is no showing whatever that the complaining parties failed to introduce all of the evidence which was available to them. And we think the court reached the right conclusion in the end."

This rule was apparently recognized by Judge Pickett in the hearing on April 10, 1962. The question raised by Judge Pickett was that Occidental would not be hurt if the two motions, which constituted the only basis for disqualification set forth in the original petition, were assigned to another Judge. Mr. Barefoot's answer and Judge Pickett's reply are as follows:

"MR. BAREFOOT: * * * But, in addition to these two specific items, we simply feel that there is a broader consideration to be given to this matter, in view of what the record has shown, a point to which I would like to address myself shortly.

"THE COURT (Judge Pickett): *But it doesn't occur to me that we could set out to punish a Judge for injudicious action or intemperate statements,* and if that would be the result of his complete disqualification because of that, *it would be a different thing* than his deciding something against your certain parties simply as a result of bias and prejudice. *We can't control the act[illegible] of a Judge any more than we can of many other human beings.* I can only say it is regrettable." (Record, Proceedings before Circuit Court of Appeals, April 10, 1962, pp. 113-14)

Also, as will be shown hereinafter, the claim of disqualification of Judge Chandler did not arise until the Judge announced that he would reject the offer of "financing" the debtor corporation in the reorganization proceedings, as made by Occidental, because of the misrepresentations, conduct and attitude of its officers and representatives. This amounted to nothing more than notice that the Court would rule adversely to Occidental on its "financing" project. It isn't denied that the rejection was couched in words that were sharp and vehement. However, the rule is well settled that adverse rulings are not evidence of "personal bias or prejudice."

In *Palmer v. United States, 249 F2d 8, 9 (10th Cir 1957)*, the Court said:

> "The allegations contained in petitioner's affidavit are but complaint of adverse rulings made by the court and subjective conclusions as to the court's motives and manner in conducting the trial and subsequent proceedings. Such claims do not meet the requirements of 28 U.S.C.A. § 144: See Berger v. United States, 255 US 22, 41 SCt 230, 65 LEd 481; Scott v. Beams, 10 Cir., 122 F2d 777; Calvaresi v. United States, 10 Cir., 216 F2d 891; Inland Freight Lines v. United States, 10 Cir., 202 F2d 169."

And in *Littleton v. De Lashmutt, 188 F2d 973, 975 (4th Cir 1951), cert den 342 US 897, 72 SCt 229, 96 LEd 672*, the court said:

> "The District Judge properly refused to disqualify himself on the grounds of bias and prejudice, as the affidavit filed was clearly insufficient under 28 U.S.C.A. § 144. If after losing a case a party could have it re-

> tried on motion and could swear off the judge who ruled against him on the ground of the rulings, there would be no end of litigation. The statute contemplated no such absurdity. The bias or prejudice which can be urged against a judge must be based on something other than rulings in the case. See Ex parte American Steel Barrel Co., 230 US 35, 43, 33 SCt 1007, 57 LEd 1379; Berger v. United States, 255 US 22, 31, 41 SCt 230, 65 LEd 481."

And in *Martin v. United States, 285 F2d 150 (10th Cir. 1960)*, Chief Judge Murrah, speaking for the Tenth Circuit Court of Appeals, cited *Palmer v. United States*, supra, and announced the rule:

> "But, even so, the adverse rulings of the court are not legal grounds for disqualification."

Next, an analysis of the fact which gave rise to the claim by Occidental of disqualification of Judge Chandler will follow.

The Factual Situation as Related to the Claim of Bias and Prejudice

Occidental Petroleum Corporation, on June 10, 1960, withdrew from the plan of reorganization which it had proposed and which had been confirmed by the Court. The Circuit Court of Appeals held that Occidental had the right to withdraw in its opinion, rendered February 7, 1961. *Occidental Petroleum Corp. v. Walker, 289 F2d 1.*

Thereafter, efforts were renewed to obtain a plan of reorganization from other sources. Western Oil Fields, Inc. became interested and decided to present a plan. It was thought

that with the pledging of all the assets of both Parker and Western, adequate financing could be obtained. This was the situation that set every interested party to work on a new plan. Judge Chandler gave much of his time and effort to this undertaking; he interviewed numbers of persons who exhibited an interest in this project. He was trying to get the creditors paid, and preserve the remaining equity for stockholders, some of whom had their life savings invested in that equity.

The record shows that on October 3, 1961 Judge Chandler entered an order giving the parties until October 20, 1961 to file a plan of reorganization. The time was later extended to November 3, 1961.

It was about this time that Occidental injected itself once more into this reorganization proceeding. About October 23 or 24, 1961 Mr. Bert Barefoot, who had been Occidental's attorney, called Judge Chandler and told him he thought he could provide the financing for the Western plan. It developed that Mr. Barefoot, at that time, was acting at the instance of Mr. Hayutin, who was associated with Occidental in its dealings with the debtor estate. (Transcript of Testimony before Circuit Court of Appeals, March 12-13, 1962, p. 22)

On November 2nd Mr. Barnholt, President of Western Oil Fields, Inc., met Mr. Hayutin in Oklahoma City at the Skirvin Tower Hotel; and in that conversation Mr. Hayutin wanted to know if Western would pledge all of its assets along with those of Parker. Mr. Barnholt told him such

assets would be pledged, and then it was that Mr. Hayutin said he would arrange the financing, using the words "I can do it." Mr. Hayutin, for his services, was to receive a "finder's fee," that is the right to purchase between two and three hundred thousand shares of Western stock at $1.25 per share. He said part of these shares would be allocated among several of his associates. Mr. Barefoot was present at least part of the time during this conversation. (See Transcript of Proceedings on January 20, 1962, pages 44 et seq.)

On November 1st Mr. Barefoot had called Judge Chandler, told him that Mr. Hayutin would be in Oklahoma City on November 2nd and that he would like to bring Mr. Hayutin to his office for an "in chambers" session. Judge Chandler told him he did not want to see Mr. Hayutin, but upon Mr. Barefoot's insistence that he talk to Mr. Hayutin "off the record" he (Judge Chandler) agreed to do so if Mr. Barefoot would be present and the Judge's law clerk could also be present. No reporter was present. (It is also to be noted that Mr. Barefoot and Mr. Hayutin asked that Mr. Hayutin be permitted to talk "off the record" on January 23rd. See pages 90 and 91 of the Transcript of that date.) Nowhere did the Judge talk "off the record," but stated openly his conclusions, as is shown by the records. It is apparent that the Judge did this for his own protection and to perpetuate the exact statements of the other parties to the conferences.

What happened next is best understood by referring to Judge Chandler's statement (Record of Proceedings in Cir-

cuit Court of Appeals of April 10, 1962, p. 15, shown as Respondent's Exhibit 4):

"As per your request, I am detailing herein certain facts concerning my conversations with Mr. Bert Barefoot with regard to the financing of the Western plan of reorganization, and concerning the testimony of Mr. Russell Ingram on March 12th, 1962, before the Court of Appeals.

"About October 23 or 24, 1961, Mr. Barefoot called me and informed me that his client, Mr. Marvin Hayutin, thought he could provide the financing for the Western plan. On November 1, 1961 Mr. Barefoot called me and asked me if his client, Mr. Hayutin, could come to see me the next day. I informed Mr. Barefoot that I did not want to see Mr. Hayutin, but upon his insistence that I talk to Mr. Hayutin off the record, I agreed to do so, provided Mr. Barefoot and my law clerk would also be present.

"In the conference of November 2nd, 1961, Mr. Hayutin, among other things, said he would see to it that the money for the plan was made available.

"I saw Mr. Barefoot many time between November 3rd and December 15th relative to financing of the plan and was continually assured by Mr. Barefoot that the money will be here.' In addition during this same period of time I frequently called Mr. Barefoot about the financing when he informed me that he had the money as promised, and each time was assured by him that the money would be coming at once.

"Prior to the hearing on Friday, December 15th, 1961, Mr. Barefoot told me in chambers, before court, that he knew that the money would be here the following day, Saturday, by noon, and at the latest the following Monday, December 18th, and strenuously urged that I confirm the plan without the money actually being in court.

"The money was not here on December 18th; nor did it come in on December 22nd, the definite date set at the hearing on December 15th for it to be paid into court. Upon repeated requests of Mr. Barefoot, I gave further extensions of time to obtain it.

"I became so concerned about the situation that while holding court in Kansas City on January 8th, 1962, I called my secretary in Oklahoma City and asked her to call Mr. Barefoot and see if the money had come. It had not. When I returned to Oklahoma City from Kansas City on January 16th, I called Mr. Barefoot about the matter again, and was told that Mr. Barefoot would have the money the next day.

"On January 17, 1962, Mr. Barefoot and Mr. James Fellers brought to me not the money, but a telegram from the United Bank of California, setting out fifteen conditions upon which it would furnish only a part of the money needed, which was entirely unsatisfactory. A commitment without strings had always been required and promised."

It was in the conferences of November 1st and 2nd, 1961, that Judge Chandler was first advised that the financing could be procured by Occidental Petroleum Corporation. No objection to this was raised by Judge Chandler; in fact, he invited them to secure this financing from Occidental. (Transcript of Proceedings before Circuit Court of Appeals March 12-13, 1962, testimony of Attorney Barefoot, p. 22)

In the hearing held on December 15, 1961, in which Western's plan was confirmed, the confirmation was based upon the statements of Mr. Barefoot, who has represented both Occidental Petroleum Corporation and Western Oil Fields, Inc. in this proceeding.

Mr. Barefoot, purportedly speaking as attorney for Western Oil Fields, Inc., went into detail as to how the financing for the plan of reorganization, in the amount of $2,500,000, would be obtained. (Record of December 15, 1961, pages 5 to 17, inclusive) In asking the Court to confirm the plan of reorganization on the basis that the "money" would be "available at the time it is needed," Mr. Barefoot said (Record December 15, 1961, p. 5):

> "MR. BAREFOOT: I might say, too, your Honor, that we at this time do not have two things. We do not have a check for two and a half million dollars, and neither do we have a written commitment to present to your Honor at this time from any bank which guarantees the payment of the two million and a half dollars. I can say to your Honor that I personally, today, have been in telephonic communication with the executive vice president of a very large national bank and that he has told me that he is in receipt of information from an Independent Geological Engineer who has made a survey of the Western Oil Fields, Incorporated, properties and that based upon those figures, I can unequivocably say to your Honor that within the time that the *money* is necessary to be filed in this Court for distribution to the creditors and for payment of the administration expenses that the *money* coming from the national bank institution and from a group of private investors will in the amount of two and a half million dollars—*in that amount will be available at the time it is needed.*"

Further in his statement to the Court, Mr. Barefoot said (Record, December 15, 1961, p. 6):

> "And that if, and in the event a fact which we do not know as of this exact moment, except, if it is necessary, we do know and I pledge to your Honor as an officer of this Court that I personally am positive that it is avail-

> able and if any outside investment is needed, then the security for that investment will be a mortgage or some type of lien which will be subordinated not only to the lien of the bank but also subordinated to the lien of the Series A. Notes."

And further in the statement Mr. Barefoot said (Record, December 15, 1961, p. 12):

> "I think your Honor recognizes that I am laboring under some difficulty in not having this written commitment here today; but I think, your Honor, and I hope your Honor, also recognizes that if I did not have this assurance which I think is requisite to the statement I have made here today, then I would not have made the statement."

The "money was not forthcoming as promised, however, and Judge Chandler, as shown above, kept extending the time at Mr. Barefoot's request. Previously, the Judge had set a deadline for Western to produce its financing as of January 30, 1962.

Finally, on January 17, 1962, just thirteen days before the deadline date set for Western to obtain its financing (upon the failure of which the pledge of Western to dedicate all its resources to the financing of the plan would be in default) Mr. Barefoot and Mr. Fellers, another of Occidental's attorneys, appeared at Judge Chandler's office, not with the promised money, but with a telegram from Occidental's bank, the United Bank of California, setting out fifteen conditions upon which it would furnish less than half of the money promised.

A copy of the said telegram is attached hereto as Exhibit 1, for this brief, but a consideration of only several of the

fifteen conditions will show why Judge Chandler became convinced that Occidental had never intended to furnish the "money," but was submitting a financing plan by which it could ultimately take control and dominion over Western Oil Fields, Inc., after its consolidation with Parker Petroleum Co., Inc. The telegram was dispatched, not to the Court or the trustee, but to Bert Barefoot,[2] attorney, at Oklahoma City, and R. M. Barnholt, Jr. (President of Western Oil Fields, Inc.), at Denver.

Some of the conditions demanded by Occidental's California bank in the telegram—which was offered in lieu of the promised "money"—are:

> (1) Instead of lending the two million dollars promised, the California bank would only furnish $700,000 of that amount and would not furnish any part of the $700,000 until it should receive a commitment of $500,000 each from Continental Illinois National Bank of Chicago and First National Bank of Denver to "participate" in the loan.
>
> This was the first information to Judge Chandler that Occidental expected any bank other than the California bank to participate in the loan.

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[2] It is not clear as to whom Mr. Barefoot was representing at this time. Previously, when Occidental Petroleum Corporation had its plan of reorganization before the District Court, he was a member of the firm that represented Occidental. On November 2, 1961 he appeared as attorney for Mr. Hayutin, Occidental's representative. (Transcript, Circuit Court of Appeals March 12-13, 1962, page 22.) On November 3, 1961 Mr. Barefoot was engaged as counsel by Western Oil Fields, Inc. That relationship terminated January 30, 1962. (See Mr. Barnholt's testimony in answer to Mr. Barefoot's questions, Transcript, Circuit Court of Appeals March 12-13, 1962, page 104.) Mr. Barnholt testified that he discontinued the services of Mr. Barefoot on account of "conflict of interest," explaining that Mr. Barefoot had also been representing Mr. Hayutin, who was "attempting or assisting in the financing of the plan of reorganization." (Id. pages 130-131.) As shown hereinabove, Mr. Hayutin was assisting Occidental Petroleum Corporation in the matter of a loan for Western Oil Fields, Inc. Thereafter, Mr. Barefoot appeared in the proceeding before the Circuit Court of Appeals as attorney for Occidental Petroleum Corporation, and in that capacity he was interrogating his former client, Mr. Barnholt, as above mentioned.

(2) A guarantee by Occidental Petroleum Corporation of a note for $300,000 to be paid "from the proceeds of the sale of the assets of Donnell Drilling Company, a wholly owned subsidiary of Western, including drilling rigs, other equipment, and real properties located in Odessa, Texas."

There had been no previous suggestion that Western would be required to sell its drilling rigs, which it needed, to repay $300,000 of the loan.

(3) "The formation of an executive committee consisting of five men, *all of whom are satisfactory to the Bank and which committee must have approval of at least four members for all major expenditures and material changes in operations;* and that the board of directors of Western will be increased from seven to nine, and the two new members will be satisfactory to the bank. *The two new members will be members of the new executive committee.*"

Since the two new members of the board would be members of the executive committee, and four of the five members are necessary to approve "all major expenditures and material changes" it follows that the two new members to be selected by Occidental through its bank could veto any such expenditure or change proposed by a majority of the committee.

The remaining provisions of the telegram will not be discussed here except to call attention to the fact that the examination of titles to hundreds or thousands of properties would require many months, delay the consummation of the plan of reorganization indefinitely, and entail tremendous fees and expenses, all of which would be borne by Western. Furthermore, the use of such vague expressions as "must be acceptable to the bank," and must be "acceptable to our

counsel" as applied to about every phase of the proposed loan, gives the whole proposal an atmosphere of great uncertainty. Apparently, the bank would reserve the right to withdraw its proposal at any time by the simple expedient of saying that something is "not acceptable."

A consideration of the conditions set forth in the said telegram will be conclusive that Occidental Petroleum Corporation was not acting in good faith. There was a plan or reorganization that had been accepted by all parties. It called for certain financing. Occidental, through its attorney, offered to provide the "money" required. Instead, after many delaying actions, it caused a telegram to be sent, and in that telegram a proposal was made, which, among other things, would give Occidental control of Western Oil Fields, Inc., would provide less than half of the money promised, and would require the sale of some needed assets by Western. None of the fifteen conditions demanded in the telegram had ever been suggested before. The money had been promised without condition. As Judge Chandler says, "A commitment without strings had always been required and promised."

It is submitted that Judge Chandler's indignation, caused by Occidental's misrepresentations and hypocritical conduct, was fully justified. Occidental defaulted on its solemn promises to produce the money. It demanded control of Western Oil Fields, Inc. as the price of providing less than half of the money promised. It would require Western to dispose of some badly needed assets that would probably bring only sacrificial prices, since such sale would partake of the nature of a forced sale.

Furthermore, the Judge was convinced that Occidental's delaying tactics were deliberate, and intended to "have Western in a position where before the 30th they couldn't go anywhere else and get the money." (Transcript, Conference on January 23 and 24, 1962, page 60)

In other words, Judge Chandler had given Western until January 30, 1962 to secure its financing. By waiting until January 17,—just thirteen days before the deadline—to submit its so-called "financing" plan, Occidental believed that Western would be forced to accept its harsh terms, because it would not then have enough time to procure its financing elsewhere. To put it another way, Occidental would use the Judge's deadline order to force acceptance of its unholy plan.

It is not denied that Judge Chandler made some strong statements about Occidental in connection with this matter. But "vehemence" alone does not constitute "personal bias and prejudice." *Ex parte American Steel Barrel Co.*, supra; *Scott v. Beams*, supra; *Baskin v. Brown*, supra.

Again, Judge Chandler's statements were not "of extrajudicial origin;" they were statements of "judicial opinion formed on evidence" and such statements do not constitute personal bias and prejudice under § 144. *Ferrarri v. United States*, supra; *Craven v. United States, 22 F2d 605 (1st Cir 1927); Martin v. United States, 285 F2d 150 (10th Cir 1960).*

At this point we digress for the purpose of setting forth some happenings that took place in California, and to show definitely that it was Occidental Petroleum Corporation and

Dr. Hammer, its president, whom Mr. Hayutin was representing when he said he would "get the money." (Transcript of Proceedings, January 20, 1962, page 65 et seq.)

Mr. Barnholt's testimony shows that he was leaving the securing of the financing to Mr. Hayutin (Tr. p. 65); but about the third or fourth week in November, at Mr. Hayutin's request, he went to California. Mr. Hayutin wanted him to meet Dr. Hammer. Mr. Hayutin said Dr. Hammer would assist "greatly in the financing" etc. (Tr. p. 68)

Mr. Barnholt and Mr. Berglund, another director of Western, went to Los Angeles as requested and met Hayutin, who took them to Dr. Hammer's home for a conference. What happened then and thereafter is detailed at length in the transcript, pages 65 through 125, but a summary thereof discloses:

(1) Mr. Hayutin was depending on Dr. Hammer to secure the financing.

(2) The money was to come from "Hammer's bank," the United Bank of California.

(3) Dr. Hammer was to conduct all the necessary negotiations with the bank.

(4) Dr. Hammer then later stated that the report of Mr. Polumbus, the petroleum engineer, as to the nature and value of the reserves to be pledged for the loan, and which it was understood would be acceptable to the bank, was not going to be sufficient; that the bank wanted another report—"another independent report on the properties." This was a week after the first conference.

(5) Then another engineer named Olson was employed, but he wouldn't set any particular time for completing

his report. He said it would be at least six weeks, and he wouldn't promise that.

(6) Dr. Hammer then reported that the bank was withdrawing its offer of a loan because apparently it didn't understand the Polumbus report, but Barnholt was later assured that Dr. Hammer "had straightened it out with the bank."

(7) This was late in December, and then Mr. Barnholt went to New York to meet Dr. Hammer and Hayutin, but nothing could be accomplished because Dr. Hammer was "going to Mexico the next day."

(8) Then Hayutin and Barnholt flew to Los Angeles on January 2nd and had an appointment with Dr. Hammer, but as Mr. Barnholt testifies (Tr. 84), "I'd say we got the stalling tactics again."

(9) Then, as Mr. Barnholt testifies, he became very "upset" with Dr. Hammer because the date set by the court for consummating the plan, January 30, 1962, was rapidly approaching and Dr. Hammer was doing nothing apparently to finalize the promised loan. So Mr. Barnholt left and returned to Denver. Mr. Berglund and Hayutin remained and kept an appointment with Hammer but got no satisfaction whatever.

(10) On Friday night, January 5th, Barnholt called Hayutin by telephone and told him that he, Barnholt, was going to Oklahoma City on Monday, January 8th, "to report my position to Judge Chandler;" and further said, "Mr. Hammer has put us in a position where we cannot go to another bank, or we have not been able to go to another bank up to now."

Further, Mr. Barnholt said: "I've got to tell the court that we're going to look elsewhere for a loan and I am positive we can get it, but we may not get it—we might not get it by the 30th; and then the decision is just going to be up to Judge Chandler." (Tr. 90)

(11) Mr. Hayutin replied that he should not be "too hasty" and said: "I think that—I am positive that he is going to come through on this * * * if you will wait one week and if he doesn't have it by Monday the 15th, he said,—I'll go to Oklahoma City with you." (Tr. 92)

(12) Upon advice from his associate, Mr. Berglund, Mr. Barnholt decided to comply with Hayutin's request and wait one week.

(13) Later, about January 11th, Dr. Hammer tried to call Barnholt over the telephone but couldn't reach him, and then got in touch with Mr. Berglund and prevailed upon him to come to Los Angeles and discuss the loan with Dr. Hammer and the bank officials on Monday, January 15th; and the following day the telegram—the one Mr. Barefoot had said would bring the "money"—was dispatched.

These further facts should be borne in mind:

(1) During all of the frustrating experiences Mr. Barnholt and Mr. Berglund were having in Los Angeles, Mr. Barefoot and Mr. Hayutin were repeatedly telling Judge Chandler that the "money" would be there.

(2) Judge Chandler knew nothing of what was going on in Los Angeles; and because, in his words, he had confidence in and a high regard for Mr. Barefoot, the attorney for Occidental and Hayutin, and Western, he accepted his word that the money would be forthcoming.

It is submitted, therefore, that it was the conduct and duplicity of Occidental Petroleum Corporation in making direct promises of the "money" to Judge Chandler, in Oklahoma City, and, at the same time, evading the making of a commitment to officials of Western in Los Angeles, that precipitated the statements made by Judge Chandler, in refusing to consider the financing proposal of Occidental.

The Statements Made by Judge Chandler Do Not Comstitute Personal Bias and Prejudice

In the affidavit for disqualification filed by Occidental, under "Section 144," it is stated (p. 2):

> "The principal statements upon which this affidavit is based took place in the chambers in the United States courthouse, at Oklahoma City, Oklahoma, on the *23rd and 24th days of January, 1962* * * *."

This was six days *after* the Occidental telegram, containing its "financing plan," was brought to Judge Chandler by Occidental attorneys, Barefoot and Fellers.

Also, in the hearing on Occidental's Petition for Disqualification in the Circuit Court of Appeals on March 12, 1962, Mr. Barefoot was asked by the Court as to the petitioner's complaints against Judge Chandler, and Mr. Barefoot replied:

> "We are here complaining of acts which we say commenced on or about the 20th of January, the 18th or 19th, that we say are fundamental, that are unknown in the history of jurisprudence." (Tr. March 12, page 25)

Again, the date fixed is shortly after Judge Chandler received the Occidental proposal and after he had expressed his opinion of it in vigorous terms. But those comments do not constitute "personal bias and prejudice." They constitute judicial opinion based on Occidental's conduct and misrepresentations.

Indeed, in the Reporter's Transcript of January 23 and 24, 1962 the comments of the Judge are based almost entirely

upon the financing proposal of Occidental, and what it reveals as to the conduct and character of its officials.

For example, Judge Chandler refers to the effort of Occidental "to choke this company to death for the benefit of somebody else so they can milk it. * * *". (Tr. 125-26); and that Mr. Hammer "prefers to milk the company and take those nice assets and the drilling equipment and the building" (Tr. 66-67); that it was Hammer's intention to be "in control of this company" (Tr. 61); and that "when you think a man gets out of line, is to stop doing business with him then." (Tr. 99-100)

The foregoing are excerpts only, but it is plain from reading the transcript that the opinions expressed by Judge Chandler were not extra-judicial; they were not prejudices or ill-will that existed independently of this case; they did not constitute "personal bias and prejudice," as that term has been judicially defined; but they arose as a result of the conduct of Occidental in this proceeding.

Therefore, the claim of bias and prejudice does not meet the test required under § 144.

The Holding of the Circuit Court of Appeals As to What Constitutes Bias and Prejudice in a Disqualification Case

In the hearing before the Circuit Court of Appeals on March 13, 1962 (Tr. March 13, page 158) Chief Judge Murrah made the statement that "we have a very narrow

issue, and that is whether or not the Court has conducted this matter in such a way as to disqualify him. And the fact that someone discharged his lawyer on the grounds that he felt there was a conflict of interest, has nothing to do with it."

Following this statement we quote from the Transcript (page 158):

"MR. IRVINE: If the Court please, is not the question even narrower than that? Is it not whether Judge Chandler has personal bias and prejudice against Occidental Petroleum."

"THE COURT (Chief Judge Murrah): *No, I think it is broader than that. No, that is not the issue.*"

"MR. IRVINE: It is the only issue that they have alleged.

"THE COURT (Chief Justice Murrah): That is not the issue that we are trying. Proceed.

"MR. BAREFOOT: I have no further questions.

"THE COURT (Chief Judge Murrah): That is not the sole issue, I should say.

"What else?

"MR. BAREFOOT: Now, Your Honor—

"THE COURT (Chief Judge Murrah): Well, that deserves just a short statement, I think, if my associates will indulge me. We are not just trying an affidavit of prejudice here—if you think that that is the scope of the inquiry, the legal sufficiency of an affidavit of prejudice.

"This Court sits to exercise its supervisory powers, and there are plenty of cases, if you will refer to them in the books, from this Court, to illustrate that very point. We are not just sitting here to decide the legal suf-

ficiency of an affidavit to disqualify a trial judge. We are sitting here in the exercise of our supervisory powers as a court, to determine whether or not in the whole matter of the proceedings here there should be some action on the part of this Court, in the exercise of those powers, which are undisputed. And in doing so, we apprehend that it goes beyond the mere legal sufficiency of an affidavit to disqualify.

"Is that right?

"THE COURT (Judge Pickett): Yes.

"THE COURT (Judge Breitenstein): Surely.

"THE COURT (Chief Judge Murrah): Now, I know that you act like you don't like it, but that's the way it is."

It seems almost unbelievable that, with so much definite authority on the subject, the Court should say that "personal bias and prejudice" is not the issue in a disqualification case. Yet that is exactly what Judge Murrah said. Also, "We apprehend that it goes beyond the mere legal sufficiency of an affidavit to disqualify," said Judge Murrah, as to exercising the Court's "supervisory" powers in a disqualification case. Then he polled his brethren on the bench and Judge Pickett said, "Yes," and Judge Breitenstein said, "Surely." Thus the Court voted to exclude the "personal bias and prejudice" rule in deciding whether or not Judge Chandler should be disqualified.

With all due deference, it is submitted that this holding was erroneous, and that alone should cause the reversal of this case.

Furthermore, in the Per Curiam Opinion of the Court, shown at page 23a, Appendix C, of the Petition for Certiorari filed herein, there is no mention of the "personal bias or prejudice" issue, no finding at all on this question. Although three briefs had been filed by interested parties, with extended discussions and citations of authority on this question, there is no reference to it in the opinion. Instead the "opinion" merely contains the following, and nothing more:

> "3. The Judge has a personal enmity, hostility, bias and prejudice against Occidental and cannot therefore fairly and impartially hear and determine any matter involving Occidental."

In view of the record, it is respectfully submitted that the Court ordered the disqualification of Judge Chandler without deciding whether he was guilty of "personal bias and prejudice."

The Per Curiam Opinion—Other Conclusions

In per curiam opinion, mentioned above, there are two other matters which, the Court says, "we find and conclude." They are:

> "1. The Judge has conducted closed-door hearings, meetings and discussions in chambers at which some but not all of the interested parties were present at the invitation of the Judge and from which the attorneys for some of those present were excluded with the di-

Briefs in opposition to the petition for disqualification were filed by Francis Irvine, Counsel for the Trustee; Herbert F. (Jack) Hewett and Earl A. Brown, attorneys for common stockholders, and J. Kirk Windle, special counsel, and William D. Scheid, attorney for Securities and Exchange Commission.

rection of the Judge that the fact of such proceedings and the matters which transpired therein should not be reported to those attorneys. At these hearings, meetings and discussions matters pertaining to the bankruptcy estate and materially affecting not only those present but those excluded therefrom were considered.

"2. After the filing of the petition in case No. 6972, the Judge tried to prevent a court officer from the performance of his official duties and responsibilities in matters relating to the bankruptcy estate."

First, it is respectfully submitted that neither of these conclusions have any bearing on the issue raised in Occidental's petition for mandamus and or prohibition. No references to them are contained in such petition. Both the petition and the affidavit for disqualification are based on statements made by Judge Chandler, nothing else.

The "Court officer" referred to in Conclusion No. 2 was Russell Ingram, Court Reporter, but he is not seeking any relief. He appeared as Occidental's witness to testify, under Attorney Barefoot's questioning, that Judge Chandler had ordered him not to turn over transcripts of certain conferences to the attorneys for Occidental. Those conferences are the closed-door hearings referred to in Conclusion No. 1.

There is quite a history behind these "in-chambers" conferences. Ironically enough, the first "in-chambers" conference mentioned in this proceeding was held at the instance of Attorney Barefoot himself. That occurred when Mr. Barefoot called Judge Chandler and asked permission to bring Mr. Hayutin to his office for an "off the record" conference on November 2, 1961. Judge Chandler agreed because it was

represented to him that Mr. Hayutin could obtain "financing" for the plan, but the Judge was careful to have present his law clerk and Attorney Barefoot, in whom he had previously expressed his confidence, to hear these conversations. (Tr. of November 2, 1962, p.) It was well that he did so in view of subsequent developments. Also, as shown in Judge ~~Chandler's~~ statement, which has not been contradicted, there were many "in-chambers" conferences between the Judge and Mr. Barefoot between December 15, 1961 and January 17, 1962, relative to Mr. Barefoot's bringing the "money" into court. (Tr., Circuit Court of Appeals, April 10, 1962, p. 15) Again Mr. Barefoot asked that Mr. Hayutin be permitted to talk to the Judge "off the record" on January 23, 1962. (See pages 90 and 91 of the Transcript of that date.)

Certainly there were other "in-chambers" conferences in which Mr. Barefoot did not participate. These are the *only* conferences about which Mr. Barefoot complains. (Transcript, Circuit Court of Appeals, pages 39, 40, March 12-13, 1962)

As a matter of fact, these conferences were not secret at all. The court reporter, Mr. Ingram, who made shorthand records of all the "in-chambers" conferences, was being solicited by Occidental attorneys, Barefoot and Fellers, for transcripts of these "proceedings" as they called them, and had been pressed by these two attorneys for copies of them for two months. (Transcript March 12-13, 1962, Circuit Court of Appeals, p. 48) Judge Chandler had objected to his

furnishing them, (except those of January 23 and 24 when Mr. Barefoot and his two clients were present) because they were not "proceedings" in the case, but merely conferences in which the Judge was seeking information which would benefit the estate, and which would be presented later in an open hearing if it became material. Apparently, the reporter was taking the position that because he was the official court reporter anything he took down was a "court proceeding," notwithstanding the fact that Judge Chandler did not have a secretary at that time. (Transcript, Circuit Court of Appeals, March 12-13, 1962, p. 50)

Regardless of all these things, Judge Chandler, as soon as he heard about the statements of Mr. Barefoot and the Court's inquiries, dispatched a special messenger to Denver with all the transcripts that had been prepared by the reporter and these arrived before the hearing was concluded, and were delivered to the Court. (See Transcript, Circuit Court of Appeals, March 12-13, 1962, pages 55 to 57, inclusive)

It should be called to this Court's attention that often in such proceedings as receiverships, bankruptcy, corporate reorganizations and other such proceedings, matters arise which are administrative in character or collateral to the main issue. Often a court can save time and expense for all parties by preliminary investigations. Such was the case here, where Judge Chandler was seeking to locate financial institutions that might provide the financing of the plan of reorganization.

Every interested party in this case—stockholders, creditors and all others—knew these "in-chambers conferences" were taking place, and that they were merely exploratory. Judge Chandler was seeking to secure the proper financing under a plan of reorganization that had been overwhelmingly adopted by vote of all interested parties, including Occidental. The stockholders, except Occidental and perhaps Hayutin, were appreciative of Judge Chandler's efforts to complete the plan of reorganization as approved by all parties. Many of them lived at great distances from Oklahoma City and these conferences saved them many trips to Oklahoma City which would have been necessary if a formal hearing had been called for every detail. They also then had and now have the fullest confidence in the sincerity, perspicacity and integrity of Judge Chandler, and approved the manner in which he has handled the case. They knew that if and when it became necessary to change or finalize the plan, there would be a full and open hearing on the matter. No objection had ever been raised to these exploratory conferences until Occidental instituted this proceeding.

Yet, the Circuit Court of Appeals appeared to be more concerned about these conferences than it was with the real issue,—the personal bias or prejudice of Judge Chandler toward Occidental. It should be *emphasized here that nothing irregular was revealed in any of these transcripts.* The order of the Circuit Court of Appeals was not directed at anything

that occurred in these conferences; it simply held that all such matters should be conducted in open hearings.

During the hearing on April 10, 1962, while Mr. Windle, Counsel for Securities and Exchange Commission, was addressing the Court, he was interrogated by members of the Court about these hearings. Quoting from the record (Transcript, Circuit Court of Appeals, April 10, 1962, pages 78 to 80):

"MR. WINDLE: Now, in this interim between December 15th and January 30th, I think the Court was carrying out his duty to try to see that the financing was forthcoming and that the plan could be consummated.

"Now I will say this: that some Judges will involve themselves more into a case than others. Some Judges would have left it entirely to the Trustee. It is a question of balance, as to what the Judge conceives his functions to be. As has been pointed out—

"THE COURT (Chief Judge Murrah): Do you favor a Judge being both investigator and a Judge?

"MR. WINDLE: I would say this, that a Judge is charged by statute with the duty to administer the estate, and the responsibility to do so. He normally acts through his Trustee. Judge Chandler, in this instance, took it upon himself to negotiate and try to bring this financing into line.

"THE COURT (Chief Judge Murrah): And the Securities and Exchange Commission approves that conduct?

"MR. WINDLE: I would say this, that to some extent it is inevitable in a Chapter 10 case. I think that some

Judges can overdo it, as far as injecting themselves into the administration of the estate. However, I think, on the other extreme, a Judge who does not acquaint himself with the problems of administration can do as much harm in a Chapter 10 case as one who goes to the other extreme and undertakes to perform the duties of a Trustee himself. And frankly, we would prefer to have a Judge who was in the middle, or who kept himself informed but left most of the details to the Trustee; and, in that respect, I would say that Judge Chandler probably goes to the one extreme more than we would like to see in Chapter 10 cases. However, I don't think that that is a basis for disqualification of the Judge."

The record will disclose that all the attorneys and interested parties who participated in the proceeding before the Circuit Court of Appeals, other than Occidental Petroleum Corporation, Hammer and Hayutin, endorse and share the views expressed by Mr. Windle.[4]

CONCLUSION

Adverting to the only issue raised in this case,—the disqualification of Judge Chandler for alleged bias and prejudice

[4]Section 11a, Title 11, United States Code, provides that courts of bankruptcy are invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, *in chambers* and during their respective terms as they are now or may hereafter be held * * *."

Also, Section 77B, Federal Rules of Civil Procedure provides: "All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All *other* acts or proceedings may be done or conducted by a judge *in chambers*, without the attendance of the clerk or other court officials and at any place, either within or without the district."

toward Occidental Petroleum Corporation—it is respectfully submitted that, for the reasons:

(1) The remedy of Occidental, if any, is by appeal from the final judgment and not under the All Writs Act;

(2) The Amended Petition for Mandamus and or Prohibition conferred no jurisdiction upon the Court because it is not supported by an affidavit under § 144, Title 28, United States Code;

(3) The "Judicial Council" of a Circuit is not empowered, under § 332 of Title 28, United States Code, to disqualify a District Judge from hearing a case pending before him; and

(4) The facts and statements attributed to Judge Chandler do not constitute "personal bias and prejudice" as those words are used in said § 144;

and for the further reasons that:

(1) that the decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals as to the "personal bias or prejudice" issue (cited under 4 hereinabove), and

(2) that strict compliance with the provisions of § 144, Title 28, United States Code, as the exclusive remedy of disqualifying a District Judge, is of the utmost importance in preventing abuses of the privileges it affords, and in safeguarding the Judiciary, generally, from unwarranted attacks upon its dignity, its integrity, and its independence;

the judgment of disqualification, entered by the Circuit Court of Appeals for the Tenth Circuit on the 20th day of

April, 1962, should be reversed and expunged from the record.

Respectfully submitted,

EARL A. BROWN,
1001 Mobil Building,
Dallas 1, Texas,
Amicus Curiae.

Of Counsel:
HERBERT F. HEWETT,
Oklahoma City, Oklahoma.

DELMER L. STAGNER,
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GENE M. GARDNER,
Duncan, Oklahoma.

JOHN S. BOTTOMLY,
Boston, Massachusetts.

EXHIBIT 1

The Telegram

Mr. Bert Barefoot, Esq.
Liberty Bank Bldg., Oklahoma City, Okla.

Mr. R. W. Barnholt, Jr.
President, Western Oil Fields, Inc.
1827 Grant, Denver

Dear Mr. Barnholt:

Our bank has approved, subject to the conditions herein contained, your application for a $2,000,000.00 loan to be secured by all of the oil and gas properties and drilling equipment of Western Oil Fields, Inc., and Donnell Drilling Company, Western's wholly owned subsidiary, including but nowise limited to those properties which are currently being purchased by Western from Parker Petroleum Co., Inc., which properties will be described in a mortgage and mortgage of chattels securing said loan. Said loan shall be further secured by a mortgage and covering that certain real property in Odessa, Texas, where the major portion of said drilling equipment is presently tored.

Said loan is to be secured also by an assignment covering the proceeds of all of the oil, gas and hydrocarbons produced, saved and sold from said oil and gas properties. Seventy percent of said proceeds, or $36,000 plus interest per month, whichever is higher, shall be applied to the reduction of principal and interest on said loan starting January 15, 1962, with the first payment due no later than

March 27, 1962, and with subsequent payments due on the 27th day of each succeeding month thereafter until the loan is fully paid. The loan will bear interest at the rate of 6½ per cent per annum on outstanding balances of principal and will be payable in accordance with the following payment schedule: Each of the foregoing monthly installments shall be applied first to the payment of interest then owing and the balance of such payment shall be applied to principal.

The above loan shall be subject to strict compliance with the following conditions:

1. A loan agreement executed by Western in the Bank's usual form and satisfactory to the bank.

2. Legal fees and expenses attributable to the reorganization of Parker payable by Western shall be limited to an amount not exceeding $250,000.00.

3. Indebtedness of Parker to its creditors, secured and unsecured, shall be less than $2,000,000.00, including interest if any.

4. Western shall have raised $500,000.00 or more from the sale of common stock and or convertible notes for cash to Western.

5. A guarantee by Occidental Petroleum Corporation of a note for $300,000.00 of said loan, it being understood that said note will be paid from the proceeds of sale of the assets of Donnell including the drilling rigs, other equipment and real properties located in Odessa, Texas.

6. Receipt by the bank of a commitment from Continental Illinois National Bank and Trust Company of Chicago and First National Bank of Denver to participate with the bank in the amount of $500,000.00 each.

7. The formation of an executive committee consisting of five men, all of whom are satisfactory to the Bank and which committee must have approval of at least four members for all major expenditures and material changes in operations; and that the Board of Directors of Western will be increased from seven to nine and the two new members will be satisfactory to the bank. The two new members will be members of the new executive committee.

8. Receipt by the bank of an opinion by outside counsel acceptable to the bank showing good title to properties securing said loan standing in Western.

9. Approval by the bank of the condition of title to all properties securing said loan.

10. Opinion of counsel acceptable to the bank to the effect that stockholders's suits and other claims against Western do not represent a material liability.

11. All matters and documents relating to the loan are to be in such form and content as are acceptable to our counsel.

12. There will be no commitment fee due the bank for making this loan.

13. There will be no prepayment penalty unless from other bank borrowings and then said penalty at the rate of ½ of 1 percent per annum on the unpaid balance.

14. All expenses in connection with the loan including attorney fees abstract of title, recording fees, etc. are to be borne by Western.

If the foregoing terms are acceptable to you will you please evidence your approval thereof by signing and returning the accompanying copy of this letter. This commitment will expire by limitation within 10 days from date hereof unless we are in receipt of an acceptance before such date.

Very truly yours,

C. R. Dodson, Vice President.